



Federal Communications Commission
Washington, D.C. 20554

July 20, 2006

DA 06-1478
In Reply Refer to:
1800B3-ALV
Released: July 20, 2006

Rev. Robert Owens
Philos Broadcasting Company, Inc.
3606 Cavitt Avenue
Bryan, TX 77801

James Mark McCann
Brazos Educational Radio
P.O. Box 78
College Station, TX 77841

In Re: Philos Broadcasting Company, Inc.
NEW (NCE FM), Caldwell, TX
Facility ID No. 91682
BPED-19980922MB

Application for NCE FM Construction Permit
Group No. 9804X2

Dear Applicants:

We have before us the above-captioned application of Philos Broadcasting Company, Inc. ("Philos") for a new noncommercial educational ("NCE") FM station at Caldwell, Texas. We also have before us a Petition to Deny ("Petition"), filed August 26, 2005, by Brazos Educational Radio ("Brazos") and related pleadings.¹ For the reasons set forth below, we deny the Petition and grant the application.

Philos and Brazos are among four mutually exclusive applicants for a new NCE FM station construction permit. By Public Notice, the Media Bureau ("Bureau") directed mutually exclusive NCE FM applicants to submit either a universal settlement agreement, engineering amendments eliminating all conflicts, or point supplement amendments by July 19, 2001.² Philos and Houston Christian Broadcasters, Inc. ("HCB"), another mutually exclusive applicant, submitted a settlement agreement by

¹ Philos filed a "Request for Extension of Time" to submit an Opposition to the Petition on September 12, 2005, and subsequently filed its Opposition on September 23, 2005. Brazos filed a Reply on September 27, 2005.

² See *Public Notice*, "Supplements and Settlements to Pending Closed Group NCE Applications," 16 FCC Rcd 6893 (MB March 22, 2001) (March 22, 2001, Public Notice); *Public Notice*, "Deadline for NCE Settlements and Supplements Extended to July 19, 2001," 16 FCC Rcd 10892 (MB May 24, 2001). The Bureau explained that it "will not entertain partial settlements" and that "applicants not filing qualifying settlements must file supplements to provide information needed to compare mutually exclusive applications." March 22, 2001, Public Notice, 16 FCC Rcd at 6893.

the filing deadline. On March 9, 2005, the Bureau disapproved the settlement because it was not universal, but afforded Philos and HCB an opportunity to file the requisite point supplement necessary to evaluate their respective applications.³ Pursuant to established procedures,⁴ the Bureau subsequently determined that Philos was entitled to a decisive preference under Section 307(b) of the Communications Act of 1934, as amended,⁵ and identified Philos as the tentative selectee in NCE MX Group 9804X2.⁶

Brazos asserts that (1) Philos is unqualified to be awarded a NCE FM station construction permit because it failed to timely file a point supplement or universal settlement plan, and (2) the Bureau should thus dismiss “Philos’ defective application” and evaluate the comparative merits of the remaining mutually exclusive applications.⁷ Although Brazos is correct that Philos did not file a “universal” settlement, it is incorrect to assert that Philos failed to submit a point supplement. Specifically, in response to the Bureau’s March 9, 2005, Letter, Philos submitted a date-stamped copy of its timely July 19, 2001, point supplement.⁸ In its March 22, 2001, Public Notice, the Bureau was explicit that only those applicants “filing *neither* a settlement agreement *nor* a supplement claiming points by [July 19, 2001] will be dismissed.”⁹ Accordingly, because Philos adhered to the Bureau’s requirements by timely filing a point supplement, we will deny Brazos’s Petition.¹⁰

³ See Letter to Jeff Southmayd, Esq., et al., 1800B3-CNZ (March 9, 2005) (“March 9, 2005, Letter”).

⁴ See 47 C.F.R. § 73.7002; see also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 15 FCC Rcd 7386 (2000), *partially reversed on other grounds*, *NPR v. FCC*, 254 F.3d 226 (D.C. Cir. 2001) (delegating authority to the Bureau to make 307(b) determinations in NCE cases).

⁵ 47 U.S.C. § 307(b).

⁶ See *Letter to Houston Christian Broadcasters, Inc., et al.*, 20 FCC Rcd 12920 (MB 2005).

⁷ Petition at 3.

⁸ See Letter from Jeffrey D. Southmayd to Peter H. Doyle (April 22, 2005). In its Reply, Brazos asserts that it was “unfair and improper to permit Philos to amend its initial point supplement four years after the fact.” Reply at 2. Philos, however, did not amend, but merely resubmitted a copy of its July 19, 2001, point supplement.

⁹ March 22, 2001, Public Notice, 16 FCC Rcd at 6893-94. The Bureau explained that it “will conclude that any applicant failing to file either a supplement or settlement on or before [July 19, 2001] is no longer interested in obtaining a permit and dismiss its application.” *Id.*

¹⁰ In its Reply, Brazos acknowledges that “ordinarily, Philos’ showing that it met the Media Bureau’s July 19, 2001, deadline by tendering a comparative point supplement would moot the issue raised in [its] Petition.” Brazos, however, argues that the application should nevertheless still be dismissed because Philos failed to elect between filing a settlement or supplement, but rather, “gam[ed] the Commission by including point supplements just in case [its] settlement plan failed.” Reply at 2. Fairness demands explicit notice for a severe sanction, such as dismissal of an application. See generally *Salzer v. FCC*, 778 F.2d 869, 871-72 (D.C. Cir. 1985) (“fundamental fairness . . . requires that an exacting application standard, enforced by the severe sanction of dismissal without consideration on the merits must be accompanied by full and explicit notice of such consideration”). As explained above, the Bureau stated that it would dismiss only applicants with neither a settlement nor supplement on file; it did not state that it would dismiss applicants filing *both* a settlement and supplement. Accordingly, we find no basis to dismiss Philos’s application based on its July 19, 2001, filings.

Accordingly, IT IS ORDERED, that the Petition to Deny, filed August 26, 2005, by Brazos Educational Radio IS DENIED, and the application of Philos Broadcasting Company, Inc. (File No. BPED-19980922MB) for a construction permit for a new NCE FM station in Caldwell, Texas IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Jeffrey D. Southmayd, Esq.
Henry A. Solomon, Esq.
Mark Van Bergh, Esq.